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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

TAKAO OZAWA
v.
THE UNITED STATES. } No. 1.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

On October 16, 1914, Takao Ozawa filed his petition in the United States District Court for the Territory of Hawaii asking to be naturalized and made a citizen of the United States. The District Court denied the prayer of the petition.

The case was carried both by appeal and writ of error to the United States Circuit Court of Appeals for the Ninth Circuit (Ctf. 2).

That court on June 4, 1917, addressed a certificate to this court, which recited that the denial of the petitioner's prayer by the District Court was based on the ground that he was a person of the Japanese race born in Japan, and not eligible to citizenship under Revised Statutes, section 2169; that the other

qualifications were proved, including the statements in the petition, and are so conceded by the Government (Ctf. 1–3).

The Circuit Court of Appeals asks the instruction of this court concerning the following questions of law (Ctf. 2):

> 1. Is the act of June 29, 1906, 34 Stats. at Large, part 1, page 596, providing "for a uniform rule for the naturalization of aliens," complete in itself, or is it limited by section 2169 of the Revised Statutes of the United States?
>
> 2. Is one who is of the Japanese race and born in Japan eligible to citizenship under the naturalization laws?
>
> 3. If said act of June 29, 1906, is limited by said section 2169 and naturalization is limited to aliens being free white persons and to aliens of African nativity and to persons of African descent, is one of the Japanese race, born in Japan, under any circumstances eligible to naturalization?

These questions can be reduced to two:

First. Is section 2169 of the Revised Statutes still of force and to be read with the act of 1906 as defining to what aliens (other than the class mentioned in section 30) the provisions of the act of 1906 apply?

Second. Is a person of the Japanese race, born in Japan, eligible to naturalization under the limitations of said section 2169?

Since the questions in this case were certified this court has decided the case of *United States* v. *Morena*, 245 U. S. 392, in which it answered in the affirmative the following question certified by the Circuit Court of Appeals for the Third Circuit:

> "Is an alien who has made a declaration of intention before the act of 1906 required to file his petition for citizenship at a time not more than seven years after the date of the act?"

It appears in the record that the petitioner herein declared his intention to become a citizen of the United States on the 1st day of August, 1902, and filed his petition for naturalization on October 16, 1914. His petition, therefore, was filed more than seven years after the date of the act of June 29, 1906. Apparently, therefore, under the authority of the Morena case, his petition must ultimately fail even though this court should sustain his contention with respect to the questions certified.

Under these circumstances it may be that this court will feel that the case is moot and therefore will be unwilling to pass upon the merits. However, the question involved is one of great importance, and the Government will be glad if the court should conclude to consider and decide it in order that the right of persons of the Japanese race with respect to naturalization may be settled.

There is another case upon the docket of this court, *Yamashita* v. *Hinkle*, secretary of state of the State of Washington, No. 177, which involves another

aspect of the same question, and in that case the Government will move for leave to file its brief in the case at bar as *amicus curiae*.

ARGUMENT.

I.

THE ACT OF JUNE 29, 1906, 34 STATUTES AT LARGE, C. 3592, ENTITLED "AN ACT TO ESTABLISH A BUREAU OF IMMIGRATION AND NATURALIZATION AND TO PROVIDE FOR A UNIFORM RULE FOR THE NATURALIZATION OF ALIENS THROUGHOUT THE UNITED STATES," IS NOT COMPLETE IN ITSELF BUT IS LIMITED IN ITS APPLICATION TO THE ELIGIBLE CLASSES OF PERSONS MENTIONED IN SECTION 2169 OF THE REVISED STATUTES.

(1) History of the naturalization laws.

The first law on this subject was passed in 1790, 1 Stat. 103, c. 3. Section 1 of that act provided:

> That any alien, *being a free white person*, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record. * * * (Repealed by act of Jan. 29, 1795, c. 20.)

The subsequent acts relating to the question at issue and their provisions have been:

The act of January 29, 1795, 1 Stat. 414, c. 20, sec. 1:

> That any alien, *being a free white person*, may be admitted to become a citizen of the United States, or any of them. * * * (Repealed by act of Apr. 14, 1802, c. 28.)

The act of April 14, 1802, 2 Stat. 153, c. 28, sec. 1:

> That any alien, *being a free white person*, may be admitted to become a citizen of the United States, or any of them. * * *

The act of March 26, 1804, 2 Stat. 292, c. 47, sec. 1:

> That any alien, *being a free white person*, who was residing within the limits and under the jurisdiction of the United States, at any time between the eighteenth day of June, one thousand seven hundred and ninety-eight, and the fourteenth day of April, one thousand eight hundred and two, and who has continued to reside within the same, may be admitted to become a citizen of the United States, without a compliance with the first condition specified in the first section of the act entitled "An Act to establish an uniform rule of naturalization." * * *

The act of March 22, 1816, 3 Stat. 258, 259, c. 32, sec. 2:

> That nothing herein contained shall be construed to exclude from admission to citizenship, *any free white person* who was residing within the limits and under the jurisdiction of the United States between [period just above mentioned, June 18, 1798, and April 14, 1802] * * *.

The act of May 26, 1824, 4 Stat. 69, c. 186, secs. 1, 4:

> That any alien, *being a free white person and a minor*, under the age of twenty-one years, who shall have resided in the United States three years next preceding his arrival at the age of twenty-one years * * * may * * * be admitted a citizen of the United States * * *.
>
> SEC. 4. That a declaration by any alien, *being a free white person*, of his intended appli-

> cation to be admitted a citizen of the United States * * * shall be a sufficient compliance with said condition * * *. [Italics in foregoing statutes are ours.]

The act of July 14, 1870, 16 Stat. 254, 256, c. 254, sec. 7:

> That the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent.

It is clear that a provision declaring the character of persons eligible to naturalization, and thus limiting the aliens so eligible, has been a part of every naturalization law, and until 1870 the limitation was to *free white persons.*

Title XXX of the Revised Statutes, sections 2165 to 2174, inclusive, provides for naturalization of aliens. Section 2165 prescribes the procedure. Section 2166 provides for naturalization of aliens who have served as United States soldiers and have been honorably discharged. Section 2169 declares what aliens may be naturalized under Title XXX, as follows:

> The provisions of this title shall apply to aliens [*being free white persons,* and to aliens] of African nativity and to persons of African descent. [Italics ours.]

In the first edition of the Revised Statutes of 1873 the words in brackets "being free white persons, and to aliens" were by an error of compilation omitted. This was corrected by the act of February 18, 1875, 18 Stat. 316, 318, c. 80. A deliberate declaration by

Congress of its will to maintain the limitation expressed by the words "white persons"; and this limitation is still the law unless it has been by implication repealed by the act of 1906 now under consideration.

When the act of July 14, 1870, 16 Stat. 254, was under discussion an amendment was offered by Charles Sumner to strike out the word "white," but the amendment was rejected through the efforts of the Western Senators, who objected that it would authorize the naturalization of Asiatics. Cong. Globe for 1869–70, part 6, pp. 5121–5125, 5163, 5176–5177. While Japan was but once mentioned, and then only casually (p. 5164), the word "Asiatics" was used repeatedly, and it is clear that the debaters understood that by use of the word "white" Japanese were excluded.

This impression is strengthened by the debate in 1875, concerning the reinsertion into the law of the words "free white persons," after their inadvertent omission from the first edition of the Revised Statutes. The Committee on the Revision of the Laws had submitted a bill to correct numerous similar omissions. Mr. Willard moved that the law be permitted to stand as printed, saying:

> It occurs to me that there is no need of making this proposed correction of the revision of the laws, unless the House is thoroughly satisfied that the law as it now stands, with the word "white" stricken out, is not a wise statute. I understand that Members from Cali-

> fornia and the Pacific coast make objection to the naturalization of *Asiatics, more especially the Chinese.* (3 Cong. Rec. 1081.)

Mr. Page immediately replied:

> I hope the amendment of the gentleman from Vermont (Mr. Willard) will not prevail. * * * When this question was discussed in the Senate some three or four years ago, upon a motion of Mr. Sumner to strike out the word "white" from the naturalization laws, the Pacific coast Senators at that time prevailed upon him to consent to amend the naturalization laws so as to include persons of African descent, *which would exclude Asiatics.*

Upon a ruling by the Speaker that amendments were out of order, the bill being merely to correct errors, and not to initiate new legislation, Mr. Willard's motion was withdrawn.

A somewhat similar colloquy took place in the Senate, where Mr. Sargent said:

> We have the guaranty of the committees that the provisions of this bill simply restore the law as Congress intended it should be at the time they passed the Revised Statutes. Let that be done and it is fair. Less than that is unfair. When that is done, if the Senator desires to bring forward a bill which shall *enable Asiatics* to be naturalized, I shall be prepared to debate that question with him. (3 Cong. Rec. 1237.)

Similarly, Mr. Ferry said:

> Mr. President, it is obvious, after what has fallen from the lips of the Senator from Cali-

fornia and the Senator from New York, that the real question after all can not be taken upon the amendment that I have proposed. That question would be whether the Senate would deliberately exclude from the operation of the naturalization laws *all Asiatics*, a third of the human race or more * * * I withdraw the amendment. (3 Cong. Rec. 1238.)

(2) The courts, in construing these laws, uniformly held that only "white persons" (aside from those of African descent) were eligible for naturalization.

The uniform judicial construction of the words "white persons" in these acts has been to limit naturalization to people belonging to what is ordinarily and in common speech known as the white or Caucasian race; and there is no reported case in which naturalization under them was granted to any person belonging to any of the races commonly called the brown, yellow, Mongolian, Malay, or Asiatic races. The following cases were decided prior to the passage of the act of 1906:

In re Ah Yup, 5 Sawyer, 155; Fed. Cas. 104:

Chinese, Circuit Court, District of California, 1878.

In re Hong Yen Chang, 84 Cal. 163.

Chinese, 1890.

In re Gee Hop, 71 Fed. 274:

Chinese, Northern District of California, 1895.

In re Po, 28 N. Y. Supp. 383:

Burmese, City Court of Albany, 1894.

In re Kanaka Nian, 21 Pac. 993:

Hawaiian; Supreme Court of Utah, 1889.

In re Camille, 6 Fed. 257:

Indian, Circuit Court, District of Oregon, 1880.

In re Burton, 1 Alaska, 111:

Indian,1900.

In re Saito, 62 Fed. 126:

Japanese, Circuit Court, District of Massachusetts, 1894.

In re Ah Yup, 5 Sawyer, 155 was a petition by a Chinese for naturalization. In denying the petition the court said:

> Words in a statute, other than technical terms, should be taken in their ordinary sense. The words "white person," as well argued by petitioner's counsel, taken in a strictly literal sense, constitute a very indefinite description of a class of persons, where none can be said to be literally white, and those called white may be found of every shade from the lightest blonde to the most swarthy brunette. But these words in this country at least, have undoubtedly acquired a well-settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance. As ordinarily used everywhere in the United States, one would scarcely fail to understand that the party employing the words "white person" would intend a person of the Caucasian race.

In speaking of the various classifications of races, Webster in his dictionary says: "The common classification is that of Blumenbach, who makes five. 1. The Caucasian, or white race, to which belong the greater part of the European nations and those of western Asia; 2. The Mongolian, or yellow race, occupying Tartary, China, *Japan*, etc.; 3. The Ethiopian or negro (black) race, occupying all Africa, except the north; 4. The American, or red race, containing the Indians of North and South America; and, 5. The Malay, or brown race, occupying the islands of the Indian Archipelago," etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair, and skull. Linnaeus makes four divisions, founded on the color of the skin: "1. European, whitish; 2. American, coppery; 3. Asiatic, tawny; and, 4. African, black." Cuvier makes three: Caucasian, Mongol, and Negro. Others make many more, but no one includes the white, or Caucasian, with the Mongolian or yellow race; and no one of those classifications recognizing color as one of the distinguishing characteristics include the Mongolian in the white or whitish race. (See New American Cyclopedia, title" Ethnology.")

Neither in popular language, in literature, nor in scientific nomenclature do we ordinarily, if ever, find the words "white person" used in a sense so comprehensive as to include an individual of the Mongolian race. Yet, in all, color, notwithstanding its indefiniteness as a

> word of description, is made an important factor in the basis adopted for the distinction and classification of races. * * *

Other cases refusing naturalization to Chinese were, *In re Hong Yen Chang*, 84 Cal. 163, and *In re Gee Hop*, 71 Fed. 274.

In re Saito, 62 Fed. 126, was a petition by a Japanese for naturalization. In denying the petition the court said (p. 126):

> This is an application by a native of Japan for naturalization.
>
> The act relating to naturalization declares that "the provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent." Rev. St. sec. 2169. The Japanese, like the Chinese, belong to the Mongolian race, and the question presented is whether they are included within the term "white persons."

This opinion then gives a history of the legislation resulting in the correction of Revised Statutes, section 2169, which has been hereinbefore recited.

> The history of legislation on this subject shows that Congress refused to eliminate "white" from the statute for the reason that it would extend the privilege of naturalization to the Mongolian race, and that when, through inadvertence, this word was left out of the statute, it was again restored for the very purpose of such exclusion.
>
> The words of a statute are to be taken in their ordinary sense, unless it can be shown that they are used in a technical sense.

> From a common, popular standpoint, both in ancient and modern times, the races of mankind have been distinguished by difference in color, and they have been classified as the white, black, yellow, and brown races. (P. 127.)

By the same reasoning it was held that a Burmese was not entitled to naturalization:

In re Po, 28 N. Y. Supp. 383,

nor a Hawaiian of the Malay race:

In re Kanaka Nian, 21 Pac. 993,

nor an Indian:

In re Camille, 6 Fed. 256,

In re Burton, 1 Alaska, 111.

At the time of the passage of the act of 1906, therefore, through a uniform course of judicial construction of statutory language, continued in the law for over a century, it had become settled that Japanese and all other people not of the white or Caucasian race were not eligible for naturalization as "white persons."

3) The act of 1906 did not extend the privilege of naturalization to any persons not theretofore eligible.

(*a*) *The purpose of the act.*

The purpose of the act of 1906 was to stop the flagrant abuses and frauds which had become scandalous, by providing safeguards and a strict and uniform procedure. The act was the result of the labors of a commission appointed by an executive order of President Roosevelt issued March 1, 1905.

The commission consisted of one officer each from the Departments of State, Justice, and Commerce and Labor. Their report was transmitted to Congress by the President on December 5, 1905 (H. Doc. No. 44, 59th Cong., 1st sess.), and its recommendations formed the basis of the bill which became the act under consideration.

In its report the commission quoted from the report of the Attorney General for 1903 the following language contained in a report of Mr. Van Deuzen, special examiner of the Department of Justice:

> The evidence is overwhelming that the general administration of the naturalization laws has been contemptuous, perfunctory, indifferent, lax, and unintelligent, and in many cases, especially in inferior State courts, corrupt.

The chief motive which led to fraudulent naturalization was the desire to vote, which caused corrupt politicians to encourage perjury and commit bribery, under the guise of paying the naturalization fees, especially just before election. Another motive was found in the labor laws and the rules of some labor unions which prevented the employment of aliens in certain classes of work. Another motive was the desire of aliens to go abroad under the protection of the United States. There was no uniformity in the actual admission of aliens to citizenship by reason of the fact that they were admitted by many different courts, State and Federal, with no uniform procedure, many of them of inferior jurisdiction and presided

over by inferior judges, and, in practice, the entire proceedings were often turned over to the clerk of the court. It was to correct these abuses that the act of 1906 was framed.

After referring to previous legislation and to the fact that the act of 1802 was still in force, the report says of that act:

> The principles laid down in that act are, in the commission's opinion, sound and should not be changed * * *.
>
> Accepting the principles laid down in the old law, the commission makes the recommendations contained in this report *with a view to preventing violations of the law;* but it also recommends that the following additional principles be incorporated into the law:
>
> First. That no one be admitted to citizenship who does not intend to reside permanently in the United States. This recommendation is discussed in another part of this report.
>
> Second. That no one be admitted to citizenship who does not know the English language. [Italics ours.]

The bill afterwards reported in the House by the Committee on Immigration and Naturalization followed the recommendation of the commission. Mr. Bonynge, in presenting the bill to the House, referred to the fact that the laws respecting naturalization were practically the same as they had been written by James Madison in 1795. He then said:

> The bill which we present to-day does not change the fundamental law in reference to naturalization, except in two particulars, to

> which I will address myself a little later; but it does provide for a general and uniform system of naturalization to be enforced throughout the United States. Cong. Record, volume 40, part 4, page 3640.

The two changes in the fundamental law, he afterwards explained, were (1) requiring the applicant to be able to write either in his own language or the English language and to be able to read, speak, and understand English; and (2) he must intend to reside permanently in the United States. In the course of his remarks Mr. Bonynge referred to the great amount of fraud which had grown up under the old law and to the appointment of a special prosecuting attorney who in two years had secured 685 convictions and the cancellation of 1,916 fraudulent certificates.

The act does not purport to declare who are entitled to be naturalized. Sections 1 and 2 create and provide for the Bureau of Immigration and Naturalization and the procedure by which naturalization can be effected. Section 27 prescribes the forms to be used. Section 15 provides for the cancellation of certificates of naturalization fraudulently or illegally procured. Sections 16 to 25 create certain crimes in connection with the subject of naturalization and provide for their punishment. Section 26 prescribes what laws are repealed by this act. Section 28 empowers the Secretary of Commerce and Labor to make rules and regulations and declares that certified copies of all papers, etc., provided for by the act are admissible in evidence instead of

originals. Section 29 makes an appropriation to carry the act into effect. Section 30 provides for naturalizing all persons not citizens who owe permanent allegiance to the United States. Section 31 declares when the act shall take effect. This completes the act.

The aliens, citizens, or subjects of other countries, eligible to naturalization under the laws of the United States can not be discovered from the act of 1906.

(*b*) *Section 2169, R. S., not repealed.*

Section 26 of the act of 1906 expressly repeals sections 2165, 2167, 2168, and 2173 of the Revised Statutes and section 39 of the act of March 3, 1903, 32 Stat. 1213, 1222, c. 1012. The subject matter of these repealed acts is covered by parts of the act of 1906. The remaining sections of Title XXX not so repealed are sections 2166, which makes special provision for honorably discharged soldiers; 2170, which makes five years' residence necessary; 2171, which forbids the admission of enemy aliens; 2172, which provides for the children of naturalized persons; 2174, which makes special provision for seamen; *and 2169, the section under consideration and which remained the only provision on the statute books defining those entitled to be naturalized.* It is inconceivable that section 2169 would not have been named as repealed unless it was purposely left as a part of the law retained. *In re Alverto,* 198 Fed. 688, 690.

To hold otherwise, in view of the long line of judicial decisions with which Congress was of course familiar, would mean to decide that the settled policy of the Nation for more than a century with respect to a matter of the most vital concern is, by mere implication, to be deemed changed in a most radical manner.

(c) *Section 2169, R. S., was specifically reaffirmed by the act of May 9, 1918, 40 Stat. 542, c. 69.*

After this case was certified to this court, Congress passed the act of May 9, 1918. This act added seven new subdivisions to section 4 of the act of 1906, making special provision for the naturalization of Filipinos, Porto Ricans, and aliens who served in the naval and military forces of the United States. It also contained provisions regarding enemy aliens, and repealed certain sections of the Revised Statutes, including sections 2166, 2171, and 2174, and further provided:

> That all acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed; *but nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined.* [Italics ours.]

This is a clear recognition and declaration that it had not been repealed, and an expression of the legislative intention to keep it in force, except as expressly therein modified.

In the brief submitted on behalf of the petitioner herein an attempt is made to repel the clear inference to be drawn from this saving clause in the repealing section by an elaborate argument which reaches the conclusion that, though section 2169 is retained in the law, "it no longer has any application." Petitioner's brief, pp. 33-36. It is stated that "the first of these subdivisions numbered 'seventh' is a curiosity chiefly because of the anomalous allegiance of the Filipino and Porto Rican" (p. 33), and that "there is no seventh subdivision of *this* act unless it be entitled 'thirteenth'" (p. 36). There is, nevertheless, a subdivision designated "seventh," and its provisions and their relation to section 2169 are perfectly clear when they are examined for the purpose of finding that they have a meaning, rather than for the purpose of finding that they have not. Their effect is to authorize naturalization of Filipinos and Porto Ricans who served in the military forces of the United States, and permitting naturalization of all aliens who had so served without complying with many formalities required of others, but did not enlarge the *right* to naturalization, except in the cases of Filipinos and Porto Ricans.

> *In re Easurk Emsen Charr*, 273 Fed. 207, District Court, Western District of Missouri, April, 1921.

That case was a petition for naturalization by a native of Korea, a subject to the Mikado of Japan, who was drafted, served in the Army of the United

States, and honorably discharged. His educational qualifications, character, and military record were good. His petition was opposed and denied upon the sole ground that members of his race were barred under section 2169 of the Revised Statutes, as the act of 1918 did not enlarge the limitation imposed by that section except as to Filipinos and Porto Ricans. The application was naturally one which would appeal strongly to the court, and Judge Van Valkenburgh gave it most painstaking care, even to the extent of a rehearing. His opinion covers the whole field of the naturalization laws logically and concisely.

The court says of the act of 1918 (pp. 210–212):

> The purpose of this act is well understood. It was to reward those aliens who had entered the military or naval service of the United States, as therein described, by admitting them to citizenship without many of the slow processes, formalities, and strictness of proofs which were rigidly provided and enforced under the law affecting naturalization as it existed then, and as it exists now. The amendments made were not to the title as a whole, but primarily to section 4 of the act of June 29, 1906, 34 Stat. 596. This section deals, not with persons eligible to become naturalized, but with the procedure to be taken and the showing to be made by those elsewhere defined to be eligible. * * *
>
> Incidentally it has been urged that section 2169 was repealed, by implication, by the act of June 29, 1906 (34 Stat. 596). The conten-

tion has uniformly been rejected, and, notably, in cases involving Filipinos. *In re Alverto* (D. C.), 198 Fed. 688; *In re Rallos* (D. C.), 241 Fed. 686; *In re Lampitoe* (D.C.) 232 Fed. 382; *United States* v. *Balsara*, 180 Fed. 694, 103 C. C. A. 660.

If, as contended by the petitioner, the exception reserved was intended to mean *any alien* who should perform military service, it is difficult to perceive why the provision as to the continuing force of section 2169 was necessary at all; the limitation of military or naval service being sufficient to preserve that section intact in all its general features. This view is corroborated and emphasized by the fact that, throughout the original title 30, Revised Statutes of 1878, the term "any alien" is used repeatedly without qualification, the limitation to free white persons and those of African nativity and descent being raised entirely from section 2169; and the same is true of section 2166 and other acts conferring special privileges upon soldiers and sailors. Moreover, as has been previously stated, the act of May 9, 1918, was chiefly intended to modify section 4 of the act of 1906 as to procedure merely, shortening the time and smoothing the way to citizenship. Section 2169 has to do only with racial qualification, and out of abundance of caution it was expressly reaffirmed.

On petition for rehearing, the court reaffirmed its decision and quoted from the report of the Sen-

ate Commission on Immigration upon the act of 1918, which contained this significant language (p. 214):

> It (section 2 of the act) also declares that nothing in the act shall enlarge or repeal in any way section 2169 of the Revised Statutes, except as specified in the seventh subdivision and under the limitation therein defined. This means that Filipinos may be naturalized who are enlisted in the army or navy of the United States and are honorably discharged therefrom.

(*d*) *Judicial interpretation since 1906.*

Since the passage of the act of 1906 the courts without exception have continued to hold that section 2169, R. S., was still in force, its limitation still binding.

In re Alverto, 198 Fed. 688.
In re Kumagai, 163 Fed. 922.
In re Knight, 171 Fed. 299.
In re Young, 198 Fed. 715.
Bessho v. *U. S.*, 178 Fed. 245.
U. S. v. *Balsara*, 180 Fed. 694.
In re Yamishito, 30 Wash. 234.
In re Dow, 226 Fed. 145.
In re Easurk Emsen Charr, 273 Fed. 207.
In re Halladjian, 174 Fed. 834.
In re Bautista, 245 Fed. 765.
In re Mohan Singh, 257 Fed. 209.
In re Sadar Bhagwab Singh, 246 Fed. 496.
In re Lampitoe, 232 Fed. 382.
In re Mozundar, 207 Fed. 115.

In re Kumagai (1908), 163 Fed. 922, was an application by an "educated Japanese gentleman"(p. 923), honorably discharged from the Regular Army, for naturalization. The District Court for the Western District of Washington, in denying the application, held that section 2166, R. S., authorizing the naturalization of aliens honorably discharged from the military service of the United States, did not, in view of section 2169, R. S., permit the naturalization of a Japanese who had served as a soldier in the United States Army, and said (p. 924):

> * * * The use of the words "white persons" clearly indicates the intention of Congress to maintain a line of demarcation between races and to extend the privilege of naturalization only to those of that race which is predominant in this country. (Citing the *Ah Yup*, *Saito*, and *Yamashita* cases.)

In re Knight, 171 Fed. 299, was an application by one whose father was English and whose mother was half Japanese and half Chinese. He had been honorably discharged from the United States Navy and had a medal for service in the Battle of Manila. The District Court, Eastern District of New York (1909), denied the application following the *Kumagai* case.

Bessho v. *United States* (1910), 178 Fed. 245, was an appeal from the District Court for the Eastern District of Virginia to the Circuit Court of Appeals, Fourth Circuit. The applicant was a Japanese who had been honorably discharged from the United

States Navy. The District Court denied the application and its decision was affirmed by the Court of Appeals, holding, after a review of the naturalization laws, that section 2169 of the Revised Statutes remained unrepealed by the act of 1906 and limited the privilege of naturalization to white persons and persons of African nativity or descent. "The intention was to exclude from naturalization all aliens except those of the Caucasian and African races."

United States v. *Balsara*, 180 Fed. 694 (Circuit Court of Appeals, Second Circuit, 1910), was an appeal from an order admitting to citizenship a Parsee. The Court of Appeals affirmed the order holding that the Parsees were white persons within the meaning of section 2169 of the Revised Statutes. The right of the applicant to be naturalized was strongly opposed by the Government and, as the court says, complete and interesting briefs were furnished. The contention of the Government was that Congress, by the words "White persons," intended to include Europeans only, while counsel for Balsara insisted that the intention was to confer the privilege of naturalization upon members of the white or Caucasian race only. The court said (pp. 695–697):

> This we think the right conclusion and the one supported by the great weight of authority. *In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104; *In re Saito* (C. C.) 62 Fed. 126; *In re Camille* (C. C.) 6 Fed. 256; *Matter of San C. Po.*, 7 Misc. Rep. 471, 28 N. Y. Supp. 383; *In re Buntaro Kumagai* (D. C.) 163 Fed. 922; *In*

re Knight (D. C.) 171 Fed. 297; *In re Najour* (C. C.) 174 Fed. 735; *In re Halladjian* (C. C.) 174 Fed. 834. Doubtless Congressmen in 1790 were not conversant with ethnological distinctions and had never heard of the term "Caucasian race" mentioned in some of the foregoing decisions. They probably had principally in mind the exclusion of Africans, whether slave or free, and Indians, both of which races were and had been objects of serious public consideration. The adjective "free" need not have been used, because the words "white persons" alone would have excluded Africans, whether slave or free, and Indians. Still effect must be given to the words "white persons." The Congressmen certainly knew that there were white, yellow, black, red, and brown races. If a Hebrew, a native of Jerusalem, had applied for naturalization in 1790, we can not believe he would have been excluded on the ground that he was not a white person, and, if a Parsee had applied, the court would have had to determine then, just as the Circuit Court did in this case, whether the words used in the act did or did not cover him.

We think that the words refer to the race and include all persons of the white race, as distinguished from the black, red, yellow, or brown races, which differ in so many respects from it. * * *

Counsel for certain Syrian interveners as amici curiae contend that the words "free white persons" were used simply to exclude

> slaves and free negroes. If so, of course, all other aliens were included. This is enforced by the further argument that the act of June 29, 1906 (act June 29, 1906, c. 3592, 34 Stat. 596; U. S. Comp. St. Supp. 1909, p. 97), repealed section 2169, Rev. St. U. S., by necessary implication, and that all aliens except those expressly excluded, like the Chinese, are now eligible to citizenship. * * * It seems to us incredible that Congress could have intended to make such a departure from existing law by implication merely.

In re Young, 198 Fed. 715, District Court, Western District of Washington, 1912, was an application by a man whose father was German and whose mother was Japanese. The application was denied. The court said (p. 716):

> The term "white person" must be given its common or popular meaning. As commonly understood, the expression includes all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered as "fair whites" or "dark whites," as classified by Huxley, and notwithstanding that certain of the southern and eastern European races are technically classified as of Mongolian or Tartar origin.
>
> It is just as certain that, whether we consider the Japanese as of the Mongolian race or the Malay race, they are not included in what are commonly understood as "white persons." In the abstractions of higher mathematics, it

> may be plausibly said that the half of infinity is equal to the whole of infinity; but in the case of such a concrete thing as the person of a human being it can not be said that one who is half white and half brown or yellow is a white person, as commonly understood.

In re Bautista, 245 Fed. 765, District Court, Northern District of California, 1917, was a petition for naturalization by a Filipino, born in the Philippine Islands while they were under Spanish rule, who was serving his third term of enlistment in the United States Navy and who had resided continuously in the United States for more than eight years, and the court held that he was entitled to be naturalized under section 30 of the act of 1906, as a person who owed permanent allegiance to the United States. The court held that while section 2169 of the Revised Statutes had not been repealed, the distinction of color therein contained must yield to section 30 of the act of 1906.

In re Lampitoe, 232 Fed. 382, District Court, Southern District of New York, 1916, was a petition for naturalization by one whose mother was a Filipino and whose father was half Filipino and half Spanish. The application was denied solely on the ground of his race, the court saying (p. 382):

> Where the Malay blood predominates it would be a perversion of language to say that the descendent is a "white person."

In re Halladjian, 174 Fed. 834, Circuit Court, District of Massachusetts, 1909, was an application by

four Armenians for naturalization, which was granted. In granting the applications Judge Lowell wrote a long, learned, and most interesting opinion, in which he departed somewhat from the views which had been expressed by other judges. He was disposed to hold that the words "white persons" were used to designate persons not otherwise classified as a sort of "catchall" to include everybody except Negroes and Indians. He held that there was no European or white race and no Asiatic or yellow race, and that the mixture of races in Western Asia for 25 centuries raises a doubt if its individual inhabitants can be classified by race, but if the ordinary classification is followed, Armenians have always been reckoned as Caucasians and white persons and that the applicants were white persons in appearance, not darker in complexion than some persons of northern European descent, and he also finds that the use of the word "white" as a "catch-all" according to his idea has been narrowed so as to exclude Chinese and Japanese.

In re Sabar Bhagwab Singh, 246 Fed. 496, District Court, Eastern District of Pennsylvania, 1917, was an application for naturalization by a Hindu and the application was denied. A long and interesting opinion was written by Judge Dickinson, his conclusion being that the Hindu was not a white person within the meaning of the Statutes.

In re Mohan Singh, 257 Fed. 209, District Court, Southern District of California, 1919, was another

application for naturalization by a Hindu and the application was granted in this case. The court also wrote a long and interesting opinion in which it was unable to agree with Judge Dickinson in the *Sabar Bhagwab Singh* case, 246 Fed. 496. In the course of the opinion the court said (pp. 211, 212):

> In spite of the discussions and not infrequent controversies in the courts, which have arisen with respect to the meaning of the phrase, Congress has seen fit at no time since its incorporation into the law to change it, and it remains to-day as it was originally enacted more than a century and a quarter ago. * * * The possession of a "common racial stamp" is the basis of classification.
>
> My conclusion is that, in the absence of any more definite expression by Congress, which is the body possessing the power to determine who may lawfully apply for naturalization, any members of the white or Caucasian race, possessing the proper qualifications in every other respect, are entitled to admission under the general wording of the statute respecting "all free white persons."

In re Mozumdar, 207 Fed. 115, District Court, Eastern District of Washington, 1913, was an application for naturalization by a Hindu. The court held him to be a white person and granted the application.

II.

ONE OF THE JAPANESE RACE, BORN IN JAPAN, IS NOT A WHITE PERSON WITHIN THE MEANING OF SECTION 2169 OF THE REVISED STATUTES, AND, THEREFORE, MAY NOT BE NATURALIZED.

Unless, then, all the mass of judicial interpretation of Congressional action which has been on the Statute books for years, of which Congress must have had knowledge, is wholly wrong, or unless Congress has silently acquiesced in what, if wrong, has amounted to continuous and wholesale defiance of the Congressional will, a Japanese may not be naturalized unless he is a white person. So the ultimate question is, is the Japanese a white person, and it presents itself as a question of statutory construction. In the first place it is said that we must give to these words the meaning which they had in the minds of the legislators of 1790, which is probably true; and that they were then used as a sort of "catchall" and meant all men except Negroes and Indians, which is surely untrue. It is undoubtedly true that the men of 1790 used the words as they understood them, and that their purview of possible and probable immigration comprised only Negroes and white men. But there is no warrant for believing that in their minds the whole human race consisted of black men, red men, and white men. To do so is to deny them the intelligence which they surely possessed. But on the other hand, to argue that they cast their eyes over the earth and considered the races thereof, and then, with delibera-

tion, chose to exclude Chinese, Japanese, and the other yellow and brown peoples, is to give them credit for an imagination which they did not have. To ascertain their intent, it is not necessary to entangle one's common sense in a web of theory. The men who settled this country were white men from Europe and the men who fought the Revolutionary War, framed the Constitution and established the Government, were white men from Europe and their descendants. They were eager for more of their kind to come, and it was to men of their own kind that they held out the opportunity for citizenship in the new nation. It is quite probable that no member of the first Congress had ever seen a Chinese, Japanese or Malay, or knew much about them beyond the fact that they were people living in remote and almost inaccessible parts of the world having manners, customs and language which seemed strange, and unwilling to mingle with western people. Chinese immigration to this country did not begin until after the discovery of gold in California, and the census of 1870 was the first to report Japanese, 55 in number.

It is a matter of common knowledge that for many years Japan, and to a somewhat less degree, China, maintained a policy of isolation, and this policy continued from the middle of the seventeenth century until the Perry Expedition in 1853. American thought and statesmanship were directed toward Europe, not toward Asia. It was "Europe" and

its "set of primary interests" with which Washington was concerned in his farewell address, and it was against interweaving our destiny with that of any part of "Europe," or entangling our peace and prosperity in the toils of "European" ambitions that he warned his countrymen. It was European trade that was sought and, beyond doubt, European immigration which was desired and expected.

The possibility of Chinese or Japanese Immigration probably never was considered. And that is the good and sufficient reason for holding that the words "white persons" as then used were not a "catchall" for all people not black or red. The fathers offered citizenship to men of the kind they knew and hoped and expected would come, not to those they did not know and did not expect to come. Citizenship has always been deemed a choice possession, and it is not to be presumed that our fathers regarded it lightly, to be conferred promiscuously according to a "catchall" classification. It could only be obtained by those to whom it was given, and the men of 1790 gave it only to those whom they knew and regarded as worthy to share it with them, men of their own type, white men. This does not imply the drawing of any narrow or bigoted racial lines, but a broad classification inclusive of all commonly called white and exclusive of all not commonly so called. This has been the rule followed by the courts, and the cases already cited, many of which show exhaustive research and wealth of learning, leave very little to be said. A reading of the opinions of the judges who

have written in these cases reveals impressive unanimity in one respect. Each person admitted, with the single exception of the Filipino (*In re Bautista, supra*, a special case), was admitted because he was deemed as matter of fact to be white; each person refused was refused because he was deemed as matter of fact not to be white. The ethnological discussions have covered a wide range of most interesting subjects, particularly in the border-line cases, the *Syrian case* (*In re Dow*, 226 Fed. 145), and the *Armenian case* (*In re Halladjian*, 174 Fed. 834). But the present case can not be regarded as a doubtful case. The Japanese is not, and never has been, regarded as white or of the race of white people.

While the views of ethnologists have changed in details from time to time, it is safe to say that the classification of the Japanese as members of the yellow race is practically the unanimous view. Unless it could be demonstrated that the Japanese were of the white race, ethnological differences would be unimportant, even if otherwise relevant.

The history of the several views as to the divisions of mankind is given in the Encyclopædia Britannica (11th ed., Vol. II, p. 113—Anthropology), as follows:

> Classifications of man have been numerous, and though, regarded as systems, most of them are unsatisfactory, yet they have been of great value in systematizing knowledge, and are all more or less based on indisputable distinctions. J. F. Blumenbach's division, though published as long ago as 1781, has

had the greatest influence. He reckons five races, viz, Caucasian, Mongolian, Ethiopian, American, Malay. * * * The yet simpler classification by Cuvier into Caucasian, Mongol and Negro corresponds in some measure with a division by mere complexion into white, yellow, and black races; but neither this threefold division nor the ancient classification into Semitic, Hamitic, and Japhetic nations can be regarded as separating the human types either justly or sufficiently. * * * On the whole, Huxley's division probably approaches more nearly than any other to such a tentative classification as may be accepted in definition of the principal varieties of mankind, regarded from a zoological point of view, though anthropologists may be disposed to erect into separate races several of his widely-differing subraces. He distinguishes four principal types of mankind, the Australioid, Negroid, Mongoloid, and Xanthochroic ("fair whites"), adding a fifth variety, the Melanochroic ("dark whites").

The article on Ethnology in this same authority divides the peoples as follows:

(*a*) Caucasic or white race. * * *

(*b*) Mongolic or yellow man. * * *

Of the typical Mongolic races, the chief are the Chinese, Tibetans, Burmese, Siamese * * * the pure Turkic peoples and the Japanese and Koreans. Less typical, but with the Mongolic elements so predominant as to warrant inclusion, are the Malay peoples of the Eastern Archipelago. * * *

(*c*) Negroid or black man.

Encyc. Britannica, 11th ed., vol. IX, p. 851.

Very recent authorities say:

> The modern Japanese are a very mixed people. The largest factor in the production of the Japanese is to be traced back to the Mongolian race of the adjacent continent. X New Int. Encyc. (Japan), p. 335.
>
> Language and anthropology show that the predominant element in the Japanese race is Mongol. VI Nelson's Encyc. (Japan), p. 567.

The article on Japan in volume 15 of the Encyclopedia Britannica, 11th edition, 1911, is written by Baron Kakuchi, President of the Imperial University of Kyoto, and the following information is from that article:

> Speaking of the physical characteristics of the Japanese, he says that "The Japanese, the Koreans, and the Chinese resemble each other so closely that, under similar conditions as to costumes and coiffure, no appreciable difference is apparent." He speaks of an "exhaustive anthropological study of the Japanese" made by Dr. E. Baelz, emeritus professor of medicine in the Imperial University of Tokyo, who enumerates the following subdivisions of the race inhabiting the Japanese Islands: "The first and most important is the Manchu-Korean type; that is to say the type which prevails in North China and in Korea * * *. The second type is the Mongol. It is not very frequently found in Japan, perhaps because, under favorable social conditions, it tends to pass into the Manchu-Korean type. * * *

> More important than either of these types, as an element of the Japanese Nation, is the Malay. * * * None of the above three, however, can be regarded as the earliest settlers in Japan. Before them all was a tribe of immigrants who appear to have crossed from northeastern Asia at an epoch when the sea had not yet dug broad channels between the continent and the adjacent islands. These people—the Ainu—are usually spoken of as the aborigines of Japan. * * * They once occupied the whole country, but were gradually driven northward by the Manchu-Koreans and the Malays until only a mere handful of them survived in the northern island of Yezo. * * * Amalgamation has been completely effected in the course of long centuries, and even the Ainu, though the small surviving remnant of them now live apart, have left a trace upon their conquerors." P. 165.

The Encyclopædia Americana, 1919, title, "Ethnology," says:

> After successive efforts by able students to classify mankind upon this or that character or group of characters, the tendency now seems to be to return to the earlier classification. To recur to the three greater subdivisions—white, black, and yellow; or Caucasian, Negro, Mongolian.
>
> With all the data gathered and the characters used in succeeding classification, the original color plan in a general way is as good as we know. Popularly, too, this seems to have

> struck the fancy. Without thought we speak of a person as white, black, or red, as he is a Caucasian, Negro, or American Indian.

The article classifies the Japanese with the Koreans, as a group of the Sibiric branch of the Asiatic or Mongolian race whose characteristic color is yellow or olive.

It is not important to the present purpose to settle accurately all these interesting questions. It is enough that there remains undisturbed the legal and popular conception that the Japanese are not white persons within the meaning of the naturalization laws.

A claim has been made that the aboriginal people of the Japanese Islands called Ainus were of the white or Caucasian stock. Even if this be true, and it is at most mere conjecture, they have been driven out by the Manchu-Koreans and Malays until, as Baron Kakuchi says, *supra*, "only a mere handful" survived; and while even they "have left a trace upon their conquerors," it can not be said that the Japanese people are, therefore, white any more than it can be said that the trace of Indian influence has made the American people red. Furthermore, there is nothing in the case to show that the petitioner is an Ainu.

The decision of the district judge in this case is a valuable contribution to the solution of the questions presented by this certificate and is printed as an appendix to this brief. It seems unnecessary to repeat the discussions there set forth.

CONCLUSION.

It is therefore respectfully submitted:

That the first question certified should be answered that the act of June 29, 1906 (34 Stats. at Large, part 1, page 596), is limited by section 2169 of the Revised Statutes of the United States.

That the second question should be answered in the negative.

As to the third question, it is respectfully suggested that under the facts stated in the certificate, it is embraced in questions one and two, and that as applied to the facts of this record, the third question should be answered in the negative.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

SEPTEMBER, 1922.

APPENDIX.

DECISION.

[In the United States District Court, Territory of Hawaii. April, A. D 1916, term. No. 274. In the matter of Takao Ozawa, a petitioner for naturalization. Aliens—Naturalization—Japanese: A person of the Japanese race born in Japan is not eligible to citizenship under the naturalization laws. Rev. Stat., sec. 2169. Petition for naturalization. Takao Ozawa, *pro se*. Horace W. Vaughan, United States District Attorney, and J. W. Thompson, Assistant United States Attorney, opposed.]

This petition for naturalization is opposed by the United States district attorney on the ground that the petitioner being, as the facts are, a person of the Japanese race and born in Japan, is not eligible to citizenship under Revised Statutes, section 2169, which limits naturalization to "free white persons" and those of African nativity and descent. The other qualifications are found by the court to be fully established, and are conceded by the Government. Twenty years' continuous residence in the United States, including over nine years' residence in Hawaii, graduation from the Berkeley (Calif.) High School, nearly three years' attendance at the University of California, the education of his children in American schools and churches, the maintenance of the English language in his home, are some of the facts in his behalf. And he has presented two briefs of his own authorship, in themselves ample proof of his qualifications of education and character. He makes the main points that in the statute the word "white" is "not used to exclude any race at all," or in other words is used "simply to distinguish black people from others," and that even in a narrow sense

of the word "white" the Japanese are eligible to citizenship. Also, as to the word "free" in the expression "free white persons," the contention is made, that this word designates the quality of person and implies goodness, worthiness, excluding only improper persons.

The first contention is regarded by the petitioner as supported by the learned opinion of Judge Lowell in the case of *In re Halladjian*, 174 Fed. 834. A brief discussion of this opinion is therefore called for, and may serve to enforce our own conclusions. The syllabus of the case reports the Court as holding:

"That the word 'white' was used to classify the inhabitants and to include all persons not otherwise classified, not as synonymous with 'European,' there being in fact no 'European' or 'white' race as a distinctive class; or 'Asiatic' or 'yellow' race, including substantially all the people of Asia; and hence the term 'free white persons' included Armenians born in Asiatic Turkey."

This is a broad ruling, and although a ruling was required only as to the eligibility of Armenians, it may appear even broad enough to divide the eligible classes into Africans and *all others*, subject of course to the exception, created by a statute of later date, in the case of Chinese. Without questioning Judge Lowell's conclusion that Armenians are eligible to citizenship, it seems that he goes too far in saying (*Id.* 843) that:

"From all these illustrations, which have been taken almost at random, it appears that the word 'white' has been used in colonial practice, in the Federal statutes, and in the publications of the Government to designate persons not otherwise classified."

His citation, for example, of the classification of the Massachusetts census of 1764, which included only whites, Negroes, mulattoes, Indians, and "French neutrals," and that of the Rhode Island census of 1748, which included only whites, blacks, and Indians, would be far from proof that Oriental races, particularly the Japanese, or even the indefinite race or races, were included or thought of at all. The most that would naturally be inferred from the use of the word "white" as a "catchall," as Judge Lowell characterizes it (*Id.* 843), is the inclusion therein of all unclassified inhabitants then in the country and not as a rigid classification to endure for all time and to include particularly persons of the Oriental races or of the so-called "yellow" races, who, as will be seen, have at all times under accepted classifications been regarded as ethnologically distinct from the white race. And the fact that as occasion arose, from the presence of a noticeable number of Chinese or Japanese; those newcomers received in the census reports a special classification, weakens very much the extreme view which may be implied from Judge Lowell's opinion. If the word "white" was a catchall, why was its use not generally continued, to include these later immigrants? Judge Lowell's opinion itself shows that when the Oriental population, as represented first by the Chinese, came to be appreciable, beginning with the census of 1860 (*i. e.*, at the first opportunity after the census of 1850), the word "white" ceased to be used as a catchall to designate those people, but they were specially classified by race. (*Id.* 844; also, 842, quoting from the Eleventh Census, part I, p. xciv.) The fact that such classification was adopted as our population of oriental

peoples became appreciable, belies Judge Lowell's statement, 174 Fed. 843–844, that "after the majority of Americans has come to believe that great differences separated the Chinese, and later the Japanese, from other immigrants, these persons were no loner classified as white." Too much is not to be inferred from the use of the words "white" and "black," or "white" and "negro" in early times when these were undoubtedly the only, or practically the only, classes here other than the Indians. Nor is undue credit to be given to even much later, and recent, census classifications which were "not uniform in all parts of the country." (*Id.* 842–843.) Or where much was left to the discretion of the director of the census. (*Id.* 843.) Far more reliance may fairly be placed upon the considered judgments of courts, rendered at least as early as 1878, or perhaps 1854, in contested cases—upon the judgments of those whose peculiar duty it was to determine the meaning of this word "white."

Such a comprehensive meaning of the word "white" as that contended for, would include Indians, yet the Supreme Court in 1884 did not regard the statute, Revised Statutes, section 2169, as so broad. See *Elk* v. *Wilkins*, 112 U. S. 94, 104, also the considerably earlier case of *Scott* v. *Sanford*, 19 How. 393, 420, which says, "Congress might * * * have authorized the naturalization of Indians, because they were aliens and foreigners." If Indians were excepted, then why not also the races of the Orient, who though since found to be more adaptable to our manners and customs, were in the earlier days regarded as strange peoples, of manners and customs incompatible with ours. The fact that more lately we have come to better appreciate that, in the language

of William Elliott Griffis ("The Japanese Nation in Evolution," 24),

"There is no necessary distinction between the oriental and occidental, the brown man and the white man. That the 'yellow brain' and the Japanese heart are ultimately different from those of the Yankee or the Briton is the notion of tradition, not the fact of science,"

does not justify the setting aside of an interpretation well established prior to the date of any of the cases, an incomplete list of fourteen of which is submitted by the petitioner—there being, it is understood, about fifty in all—of Japanese who have been naturalized by State and Federal courts. The earliest of these fourteen cases, that of Seizo Matsumoto, naturalized by a court of Pierce County, Wash., is as recent as January, 1896, two years later than the case of *In re Saito*, 62 Fed. 126, and sixteen or more years subsequent to two cases which took a view broad enough to exclude Japanese. *In re Camille*, 6 Fed. 256, and *In re Ah Yup*, 1 Fed. Cas. 223, No. 104. Indeed, as early as 1827 Chancellor Kent inclined to the same opinion as the two cases just cited; for he says in his Commentaries, volume 2, page 72:

"The act of Congress confines the description of aliens capable of naturalization to 'free white persons.' I presume this excludes the inhabitants of Africa, and their descendants; and it may become a question, to what extent persons of mixed blood are excluded, and what shades and degrees of mixture of color disqualify an alien from application for the benefits of the act of naturalization. Perhaps there might be difficulties also as to the copper-colored natives of America, or the yellow or tawny races of

the Asiatics, and it may well be doubted whether any of them are 'white persons' within the purview of the law."

And in 1854 the dictum of Chief Justice Murray of California in *People* v. *Hall*, 4 Cal. 399, 403, 404, is that "the word 'white' has a distinct signification, which *ex vi termini* excludes black, yellow, and all other colors."

In the case of *Ah Yup*, *supra*, in holding that Chinese are not white persons, Circuit Judge Sawyer in 1878 said:

"The words 'white person,' as well argued by petitioner's counsel, taken in a strictly literal sense, constitute a very indefinite description of a class of persons, where none can be said to be legally white, and those called white may be found of every shade from the lightest blonde to the most swarthy brunette. But those words in this country at least, have undoubtedly acquired a well-settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance. As ordinarily used everywhere in the United States one would scarcely fail to understand that the party employing the words 'white person' would intend a person of the Caucasian race.

"In speaking of the various classifications of races, Webster in his dictionary says: 'The common classification is that of Blumenbach, who makes five. (1) The Caucasian, or white race, to which belong the greater part of the European nations and those of Western Asia; (2) The Mongolian, or yellow race, occupying Tartary, China, Japan, etc.; (3) The Ethiopian or Negro (black) race, occupying all Africa, except the North; (4) The American, or red

race, containing the Indians of North and South America; and (5) The Malay, or brown race, occupying the islands of the Indian Archipelago, etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair, and skull. Linnæus makes four divisions, founded on the color of the skin: (1) European, whitish; (2) American, coppery; (3) Asiatic, tawny; and (4) African, black. Cuvier makes three—Caucasian, Mongol, and Negro. Others make many more, but no one includes the white, or Causasian, with the Mongolian or yellow race; and no one of those classifications recognizing color as one of the distinguishing characteristics includes the Mongolian in the white or whitish race.' (See New American Encyclopedia, title 'Ethnology.')

"Neither in popular language, in literature, nor in scientific nomenclature, do we ordinarily, if ever, find the words 'white person' used in a sense so comprehensive. Yet, in all, color, notwithstanding its indefiniteness as a word of description, is made an important factor in the basis adopted for the distinction and classification of races. I am not aware that the term 'white person' as used in the statutes as they have stood from 1802 till the late revision, was ever supposed to include a Mongolian. While I find nothing in the history of the country, in common or scientific usage, or in legislative proceedings, to indicate that Congress intended to include in the term 'white person' any other than an individual of the Caucasian race, I do find much in the proceedings of Congress to show that it was universally understood in that body, in its recent legislation, that it excluded Mongolian.

"* * * Whatever latitudinarian construction might otherwise have been given to the term 'white person,' it is entirely clear that Congress intended by this legislation to exclude Mongolians from the right of naturalization."

This case was determined four years before the enactment of a special statute prohibiting the naturalization of Chinese, 22 Stat. 53, 61. It is quoted at length to include its review of the then prevailing race classifications.

In 1880 in *In re Camille, supra*, 6 Fed. 257, Judge Deady approved of Judge Sawyer's view above quoted, though the case involved not a person of an oriental race but one of Indian blood. See also, the specific reference to the Chinese, *Id.*, 258.

In 1894, Circuit Judge Colt, in the case of *In re Saito, supra*, rules directly on the eligibility of Japanese. He says:

"The history of legislation on this subject shows that Congress refused to eliminate 'white' from the statute for the reason that it would extend the privilege of naturalization to the Mongolian race, and that when, through inadvertence, this word was left out of the statute, it was again restored for the very purpose of such exclusion.

"The words of a statute are to be taken in their ordinary sense, unless it can be shown that they are used in a technical sense.

"From a common, popular standpoint, both in ancient and modern times, the races of mankind have been distinguished by difference in color, and they have been classified as the white, black, yellow, and brown races.

"And this is true from a scientific point of view. Writers on ethnology and anthropology base their

division of mankind upon differences in physical rather than in intellectual or moral character, so that difference in color, conformation of skull, structure and arrangement of hair, and the general contour of the face are the marks which distinguish the various types. But, of all these marks, the color of the skin is considered the most important criterion for the distinction of race, and it lies in the foundation of the classification which scientists have adopted."

Judge Hanford in the case of *In re Buntaro Kumagai*, 163 Fed. 922, 924, is of opinion that:

"The use of the words 'white persons' clearly indicates the intention of Congress to maintain a line of demarkation between races, and to extend the privilege of naturalization only to those of that race which is predominant in this country."

He cites in support of this opinion the cases of *Ah Yup and Saito, supra*, and also the case of *In re Yamashita*, 30 Wash. 234, 70 Pac. 42 (1902). His opinion is followed in the case of *In re Knight*, 171 Fed. 299, in which the applicant was one-quarter Japanese and one-quarter Chinese and in which Judge Chatfield holds, *Id.*, 300, that neither Chinese nor Japanese can be naturalized—though, it is true, it was only necessary for him to hold for the purposes of the case, that the substantial element of Chinese blood was sufficient to exclude the petitioner, regardless of the eligibility of Japanese. And the Circuit Court of Appeals of the Fourth Circuit in *Bessho* v. *United States*, 178 Fed. 245, and Judge Cushman in *In re Young*, 198 Fed. 715, held expressly that Japanese aliens are ineligible to citizenship.

To meet any argument that the enactment of a special statute prohibiting naturalization only of

Chinese implies the eligibility of the Japanese, who are not included in any special prohibition, reference is made to *In re Kanaka Niau*, 21 Pac. 993–994, 6 Utah, 259 (1889), and *Bessho* v. *United States*, 178 Fed. 245, 248 (Circuit Court of Appeals); also in *In re Ah Yup*, 1 Fed. Cas. 224, decided as above noted, before the enactment of the special prohibition against Chinese, *In re Saito*, 62 Fed. 127, and *Fong Yue Ting* v. *United States*, 149 U. S. 698, 716.

As against these authorities, no reported case is known in which a person of the Japanese race has been naturalized, in which the court has rendered a written opinion to justify its ruling or in which there has been a contest to evoke the most thorough consideration. There are recent judicial opinions, that the statute in its present form is not to be "construed in the light of the knowledge and conception of the legislators who passed the original statute in 1790, without regard to the more definite and special knowledge and conception which must be attributed to the legislators who, upon reconsideration of the whole subject, enacted subsequent statutes including that now in force." *Dow* v. *United States*, 226 Fed. 145, 147. See also *In re Muddari*, 176 Fed. 465, 467, and a learned opinion of Judge Morrison of the Superior Court of California, rendered May 7, 1914, in the case of *In re Sakharan Ganesh Pandit*. But the *Dow case*, for example, in using the language just quoted and in referring to more recent legislation, had in mind the legislation of 1875 in which the words "free white persons," omitted by error from the revision of 1873 (62 Fed. 127) were restored. 226 Fed. 147. And, aside from the circumstance that the decisions just referred to were dealing with border-line cases of races closely related to what may

be loosely called the "Europeans," who were perhaps in 1780 here considered as the only white people (226 Fed. 145, 147, 148), it is of most practical importance to bear in mind that the ethnological divisions which classed the Japanese as of the Mongolian or yellow race, were what the legislators of 1875 and the courts thereafter down even to the present have had to rely upon as their guides. See quotation in *In re Ah Yup*, *supra* (1878), from Webster's Dictionary, probably the most widely circulated work in America except the Bible, and even the very recent edition of the Encyclopedia Britannica, 11th ed., vol. 9, page 851. This classification was undoubtedly well known in this country early in the last century, as it was in Germany before 1790, the date of the original enactment of the statute. Even if, as the petitioner contends, Blumenbach's classification is unscientific (see *In re Dow*, 213 Fed. 355, 358, 359, 365; *In re Mudarri*, 176 Fed. 466, 467), nevertheless it has not yet been superseded so far as to assimilate the Japanese with what for many years, at least as early as 1854, and especially before 1875, has been generally regarded as the "white" race.

Tylor, one of the highest authorities, in his book of 1881, "Anthropology" (Appleton's ed. 63, 96–98), points out that the Japanese have characteristics of the "Mongoloid type of man" in which one prominent feature is that "their skin is brownish yellow." The most recent encyclopedic authority (9 Enc. Britt. 11th ed. (1910), 851) classes the Japanese as Mongolic or yellow, though placing the Ainos, a small element of the people of Japan, as Caucasic or white. See also 15 *Id.* 165. In addition to this unobstructed current of authority reference may be had to a very

late work, "A History of the Japanese People," by Capt. F. Brinkley, included by Dr. William Elliot Griffis in a list of the English scholars who "have made obsolete most of the old European learning about Japan" ("The Japanese Nation in Evolution," 20).

"The Japanese are of distinctly small stature. * * * Their neighbors, the Chinese and the Koreans, are taller. * * * Nevertheless, Prof. Dr. Baelz, the most eminent authority on this subject, avers that 'the three great nations of eastern Asia are essentially of the same race,' and that observers who consider them to be distinct 'have been misled by external appearances.' Brinkley, History, etc., *supra*, 57–58, see also 59, 60. That the Japanese have, however, an element of white, Caucasian or Iranian, blood is noted. *Id.* 58, see also 45, 54, 55."

Another recent book may be quoted as giving the opinion of a Japanese educator, "The Life and Thought of Japan," by Okakura Yoshisaburo (published by E. P. Dutton & Co., 1913):

"And as to those swarms of immigration from China and Korea, who crossed the sea at various periods in the early days of Japanese history, it did not take many generations before they came to adopt the views of the people with whom it was their interest in every way to get mixed, and thus they lost their own identity. In this manner, notwithstanding an extensive admixture of foreign elements to our original stock, we find ourselves as closely unified a nation as if we had been perfectly homogeneous from the very beginning. One and the same blood is felt to run through our veins, characterized by one and the same set of religious and moral ideas. This may perhaps be due to the fact that the three ele-

ments—the conquering, the conquered, and the immigrating—belonged originally to the same Mongolian race, with very little trace of any mingling of Ainu and Malayan blood. [*Id.*, 48, 49.]

"You will come, at least to some extent, to acknowledge the truth of the statement so often made in books on Japan, that there are two distinct racial face types among the present Japanese * * *. Be it remembered that both types are Mongol. Both have the yellowish skin, the straight hair, the scanty beard, the broadish skull, the more or less oblique eyes, and the somewhat high cheek bones, which characterize all well-established branches of the Mongol race. [*Id.* 41.]

"The relation here displayed between the living and the departed may be considered as a characteristic of the Mongolian race to which both the Japanese and the Chinese belong. [*Id.* 54.]"

Whether these views just quoted are wholly accurate or not, I do not undertake to say. They are at all events in line with the statements of scientific works which have been, as already intimated, the guides of our courts in all cases known to have been contested or in which the court rendered a written opinion,—even though recognizing that there is in the Japanese an element of white blood. See reference to Brinkley, *supra*.

Dr. Griffis' interesting book, in a broad spirit of tolerance, notable in one for forty years in the closest touch with Japan and for some years a resident there, goes far to demonstrate the conclusion that "the Japanese are not Mongolian." "The Japanese Nation in Evolution," 400. Rev. Dr. Doremus Scudder, of Honolulu, who is himself intimately acquainted with the Japanese people, and who may be termed a friend

of the court, has submitted in behalf of the petitioner this authority as tending at least to support the view that the Japanese are "white persons" even in a narrow sense of those words. But Dr. Griffis, after all, does not seem to be at variance with the common authorities on ethnology. It is plain that he is speaking of the later development of the Japanese away from all that is narrow in the sense of "Mongolian," or "Oriental,"—of their "both deserving and winning success" (*Id.* 400) in competition, or rather comparison, with the most progressive and enlightened peoples of the world. He recognizes the Mongolic element constantly. "White men, belonging to the great Aryan family and speaking a language akin to the Indo-Germanic tongues, were the first 'Japanese,' who are a composite and not a pure 'Mongolian' race. Their inheritance of blood and temperament partakes of the potencies of both Europe and Asia." *Id.* 1, also 21, 25, 349. He also recognizes the Malay element, which—at least "the Malay peoples of the Eastern Archipelago"—the last edition of the Encyclopedia Brittanica includes in the Mongolic or yellow division of the races, though "less typical" but with the "Mongolic elements so predominant as to warrant inclusion." Says Dr. Griffis (*Id.* 30), "Those most familiar with the races, the Mongol, Aryan, and the Malay, now so differentiated, consider that in the Nippon composite the Malay strain predominates."

Also *Id.* 30–31 et seq. Though Dr. Griffis believes that "the basic stock of the Japanese people is Aino" (a white people) * * * "by 'basic stock' * * * mean(ing) the oldest race in the islands" (*Id.* 5, also 1), yet he speaks of the Ainos as having been "crowded out" (*Id.* 9)—elsewhere characterizing the process as absorption not elimination (*Id.* 26);

and Brinkley, History, etc., *supra*, 56 (see also 44), notes the "steady extermination for twenty-five centuries" of the Ainu element, characterized by him as having "left as little trace in the Japanese nation." *Id.* 58.

Intelligent men, of course, agree with Dr. Griffis that the words "Mongolian" and "Oriental," as mere epithets, can bear no sense of unworthiness or inferiority in the case of the Japanese people.

A few words are called for by the cited examples of the Magyars of Hungary and of the very dark Portuguese, who are both freely admitted to citizenship, in spite of the fact that the former are Mongolic in origin and that the latter are in a strict sense of the word not "white." Many of the decisions admit the difficulties inherent in the statutory classification, and even Judge Lowell has declared that he "greatly hopes that an amendment of the statutes will make quite clear the meaning of the word 'white' in section 2169." *In re Mudarri*, 176 Fed. 465, 467. Indeed in this latter case his language seems to cast doubt upon the practicability of the rule applied in the *Halladjian case*. He says, 176 Fed. 467:

"No modern theory has gained general acceptance. Hardly anyone classifies any human race as white, and none can be applied under section 2169 without making distinctions which Congress certainly did not intend to draw; e. g., a distinction between the inhabitants of different parts of France. Thus classification by ethnological race is almost or quite impossible. On the other hand, to give the phrase 'white person' the meaning which it bore when the first naturalization act was passed, viz, any person not otherwise designated or classified, is to make naturalization depend upon the varying and conflicting clas-

sification of persons in the usage of successive generations and of different parts of a large country."

But the examples just cited may be regarded as exceptional. Centuries before our first legislation on naturalization, the Magyars had "become physically assimilated to the western peoples." 17 Enc. Britt., 11th ed., 393, 394. "In their new environment their Mongolic physical type has gradually conformed to the normal European standard." Webster's New International Dictionary (1913), title "Magyar," quoting A. H. Keane. They have long been "one of the dominant people of Hungary—which they conquered at the close of the ninth century" (Id.); and they, with the Portuguese of varying degrees of color are within the meaning of "white," as commonly understood, and as explained by Judge Cushman in the case of *In re Young*, 198 Fed., 716, 717:

"The term 'white person' must be given its common or popular meaning. As commonly understood, the expression includes all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered as 'fair whites' or 'dark whites,' as classified by Huxley, and notwithstanding that certain of the southern and eastern European races are technically classified as of Mongolian or Tartar origin.

"It is just as certain that, whether we consider the Japanese as of Mongolian race or the Malay race, they are not included in what are commonly understood as 'white persons.' "

See also *Dow* v. *United States*, 226 Fed. 145, 147.

Though the intent of the word "white" is determinative of the case, we may well dispose of the petitioner's argument that the use of the word "free" in the expression "free white persons" emphasizes

the element of worthiness, good quality, as against the element of color. The use of the word "free" in the debates in the Constitutional Convention in 1787 affords most reliable evidence of what the word meant at about and shortly before its first use in the naturalization laws. It is recorded that Gouverneur Morris in moving to insert "free" before the word "inhabitants," with reference to the apportionment [40] of members of the House of Representatives, used the word as the opposite of "slave." Madison's Journal of the Constitutional Convention (Albert Scott & Co., Chicago, 1893), 478. And such has always been its intent, not only when this statute had its origin, but shortly after the Civil War, when the statute was revised after a brief suspension—though the retention of the word "free" had then become unnecessary.

As lately as 1906 Congress went over the whole law of naturalization, and yet in the face of the well-known rulings of the published decisions which had interpreted the particular section here in question, the section was left just as it was. This is a very persuasive reason for the conclusion that Congress acquiesced in and adopted the interpretation which the courts had put upon its own work. 226 Fed. 145, 148. The remedy for uncertainty in the statute, or for its unfairness or inconsistency with the theory and spirit of our institutions, lies, of course, with the legislative body.

In view of the foregoing authorities and considerations, the court finds that the petitioner is not qualified under Revised Statutes, section 2169, and must therefore deny his petition; and it is so ordered, in spite of the finding hereby made that he has fully established the allegations of his petition and, except

as to the requirements of section 2169, is in every way eminently qualified under the statutes to become an American citizen.

(Sgd.) CHAS. F. CLEMONS,
Judge of the United States District Court
for the Territory of Hawaii.

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